Internal Revenue Service

Number: **202041005**
Release Date: 10/9/2020

Index Number: 61.00-00, 817.00-00

Department of the Treasury
Washington, DC 20224

Third Party Communication: None
Date of Communication: Not Applicable

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Refer Reply To:
CC:FIP:B01
PLR-117915-16

Date:
July 13, 2020

Taxpayer	=
Parent	=
Affiliate	=
Separate Account	=
Operating Partnership	=
Newco GP	=
State 1	=
State 2	=
v	=
w	=
x	=

Dear :

This letter is in response to the submission by your authorized representatives, requesting a ruling on whether the assets held by the Separate Account are owned by the Taxpayer for federal income tax purposes.

FACTS

Taxpayer is an insurance company within the meaning of § 816(a) of the Internal Revenue Code (the "Code") and is taxable under Subchapter L of the Code. Taxpayer is a stock life insurance company incorporated under the laws of State 1. Taxpayer is a wholly owned indirect subsidiary of Parent. Taxpayer and Parent file a consolidated federal income tax return on a calendar year basis, and Taxpayer's overall method of accounting is an accrual method.

A. The Pension Contracts and the Separate Account

Taxpayer issues group annuity contracts, which are pension plan contracts within the meaning of § 818(a) ("Pension Contracts"), to pension plans, including qualified plans and Employee Retirement Income Security Act of 1974, as amended ("ERISA") plans, state and local government pension plans, church plans, and Taft-Hartley plans ("Qualified Plans"). The Qualified Plans are either defined benefit plans or defined contribution plans.

The Pension Contracts are funded by real estate assets held in the Separate Account, which is sponsored by Taxpayer and managed by Affiliate, a wholly owned indirect subsidiary of Parent. The Separate Account invests primarily in high quality, well-leased real estate properties in the multifamily, industrial, office, retail, and hotel sectors in the United States. The Separate Account's real estate assets (collectively, "Real Estate Assets") are typically held in single-member limited liability companies wholly owned by Taxpayer. However, the Real Estate Assets may be owned in fee simple, with Taxpayer as titleholder of record, or in a joint venture managed by Taxpayer's joint venture partner.

Taxpayer charges the Separate Account annual investment management fees ranging from w to x basis points of the net asset value of assets under management. Taxpayer accepts investments in the Separate Account each business day (in the absence of a contribution queue) and generally permits withdrawals each business day. However, Taxpayer may impose withdrawal limitations for larger investors in the Separate Account on an investor-by-investor basis from time to time based on the size of pending withdrawal requests and for all investors based on lack of liquidity or during times of financial crisis. Otherwise, there is generally no lockout period for withdrawal by investors.

The Taxpayer represents that the Pension Contracts provide contract holders with a contractual right to certain payments, but do not provide such investors with any ownership interest in the Separate Account's assets. The Separate Account is subject to the insurance law of State 1, and as such, must maintain its assets and liabilities, including realized and unrealized gains and losses, separate from Taxpayer's other assets, maintain certain levels of operational reserves, observe certain valuation policies, and make certain disclosures to investors.

B. Proposed Restructuring

Taxpayer intends to restructure the Separate Account's assets as follows:

Taxpayer will contribute substantially all of the Separate Account's Real Estate Assets to Operating Partnership, a State 2 limited partnership, in exchange for a limited partnership interest in Operating Partnership. Affiliate will organize Newco GP, a State 2 single-member limited liability company, to act as the general partner of

Operating Partnership, and Newco GP will not have an economic interest in Operating Partnership. Furthermore, Operating Partnership will contribute the Real Estate Assets to one or more real estate investment trusts ("REITs"), in exchange for REIT shares. After the restructuring, the Separate Account will generally maintain more than v percent of its assets (other than cash and cash equivalents), tested, as of the end of each calendar year or other date that the Separate Account may reasonably determine, based on a 5 year rolling average of the prior 5 calendar years, directly and outside of its ownership interests in Operating Partnership (the "Directly Held Assets").

Affiliate plans to create a State 2 limited partnership ("Direct Fund") for which Newco GP or another affiliate of Affiliate will act as the general partner. At all times, Direct Fund's sole investment will be a limited partnership interest in Operating Partnership. Investment in Direct Fund will be limited to: (i) Institutional Investors, (ii) high net-worth individuals, (iii) governmental plans that are not Qualified Plans, and (iv) other investors that are not Qualified Plans. Taxpayer represents that Qualified Plans will not be permitted to invest in Direct Fund.

Direct Fund's annual investment management fees will range from w to x basis points of the net asset value of assets under management. Direct Fund may accept capital contributions as frequently as daily, in exchange for additional units in Direct Fund. Direct Fund will permit withdrawals on a daily basis, with limitations for larger investors on an investor-by-investor basis and may limit withdrawals for all investors in periods of reduced liquidity or during times of financial crisis.

C. Representations

In addition to the facts presented above, Taxpayer has also made the following representations:

(1) The Pension Contracts meet the definition of a "pension plan contract" under § 818(a).
(2) Taxpayer and Affiliate are fiduciaries (within the meaning of section 3(21) of ERISA) of the Separate Account.
(3) Pension Contract owners do not have any agreement with Taxpayer or Affiliate regarding the assets in which the Separate Account will invest in the future or regarding the Separate Account's continued investment in specific Real Estate Assets.
(4) Taxpayer is not required to continue to invest the Separate Account in Operating Partnership or to invest future money available to the Separate Account in Operating Partnership or any other particular asset, and has not promised the Pension Contract owners that it will do so.
(5) All investment decisions concerning Operating Partnership will be made by Affiliate, and certain decisions are subject to approval by Affiliate's investment committee. All investment decisions concerning the assets of

the Separate Account will be made by Affiliate, and certain decisions are subject to approval by Taxpayer's investment committee.

(6) A Pension Contract owner will not be able to direct the Separate Account's or Operating Partnership's investment in any particular asset or recommend a particular investment or investment strategy, and there will not be any agreement between a Pension Contract owner and Taxpayer or Affiliate regarding a particular investment of the Separate Account or Operating Partnership.

(7) No Pension Contract owner will be able to influence directly or indirectly Taxpayer's or Affiliate's decisions concerning the selection, quality, or rate of return on any specific investment or group of investments held by the Separate Account or Operating Partnership.

(8) A Pension Contract owner will not have any legal, equitable, direct, or indirect ownership interest in any of the assets of the Separate Account or Operating Partnership. Rather, a Pension Contract owner only will have a contract claim against Taxpayer to collect cash under the terms of the Pension Contract.

(9) Neither Taxpayer nor Affiliate solicits Pension Contract owners or prospective Pension Contract owners to make recommendations about the selection, quality, or rate of return of any specific investment or group of investments held in the Separate Account or in Operating Partnership.

(10) Public access to the Separate Account will be available exclusively through the purchase of a pension plan contract within the meaning of § 818(a).

LAW

The Service has issued a series of "investor control" rulings that address when the holder of a variable life insurance contract or variable annuity contract will be treated as the owner of the assets held by a separate account that funds the contract. See Rev. Rul. 77-85, 1977-1 C.B. 12, Rev. Rul. 80-274, 1980-2 C.B. 27, Rev. Rul. 81-225, 1981-2 C.B. 12, Rev. Rul. 82-54, 1982-1 C.B. 11, Rev. Rul. 2003-91, 2003-2 C.B. 347, and Rev. Rul. 2003-92, 2003-2 C.B. 350. Under these rulings, a contract holder will be treated as the owner of the separate account assets if: (1) the contract holder possesses sufficient control over the investments made by the separate account (the "investor control prong"), or (2) the separate account assets are not available exclusively through the purchase of a life insurance or annuity contract (the "public availability prong").

In Rev. Rul. 77-85, the Service concluded that a policyholder of an investment annuity contract issued by a life insurance company was the owner of the custodial account assets that were used to fund the annuity payments for federal income tax purposes. The policyholder maintained investment control over the account by retaining the power to direct the custodian in writing at any time to sell, purchase, or exchange securities or other assets held in the custodial account. The policyholder could also

exercise his right to vote the securities through the custodian or personally. Although the policyholder could not receive amounts directly from the account and could not receive distribution of assets in kind, the policyholder could surrender the policy in full or in part prior to the annuity starting date, which would require the insurance company to sell all or part of the custodial account assets and make a payment to the policyholder equal to the proceeds that the insurance company received from the sale, less any cash surrender charges. Furthermore, the policyholder enjoyed any increase or suffered any decrease in the value of the custodial account assets.

In Rev. Rul. 80-274, an insurance company sold annuity contracts to depositors of participating savings and loan associations. Each depositor paid premiums in exchange for an annuity contract. The premiums could be cash, an existing passbook savings and loan account, or certificates of deposit. The insurance company deposited the premiums less any fees into a separate account of the savings and loan association of depositor, and the amounts deposited were invested in certificates of deposit for a term designated by the policyholder. Interest earned on the investments was credited to each annuity account, and a policyholder could withdraw all or a portion of the cash surrender value of the contract at any time prior to the annuity starting date. The cash surrender value equaled the amount deposited plus interest credited less a charge for withdrawal. The Service ruled that the policyholder, and not the insurance company, was the owner of the certificates of deposit for federal income tax purposes because the policyholder's position was substantially identical to what the policyholder's position would have been had the investment been established directly with the savings and loan association. The insurance company was little more than a conduit between the policyholder and the savings and loan association.

In Rev. Rul. 81-225, the Service described five situations in which an individual purchased a deferred variable annuity contract from a life insurance company and the premiums under the contract were allocable to a variable account (or sub-accounts). In four of the situations, the sole asset of the account were shares in mutual funds that were directly available to the public (Situations 1, 2 and 3) or indirectly available to the public through the purchase of an investment plan account described in Rev. Rul. 70-525, 1970-2 C.B. 144, that invested in the mutual fund (Situation 4). In those situations, the Service concluded that the contract holder had investment control over the mutual fund shares and that the contract holder's position in each situation was substantially identical to what it would have been had the mutual fund shares been purchased directly by the contract holders. Conversely, in the situation in which the mutual fund shares were only available through the purchase of an annuity contract (Situation 5), the insurance company was the owner of the shares for federal income tax purposes.

In Rev. Rul. 82-54, a life insurance company issued variable payment and fixed payment deferred annuity contracts that were funded through a separate account of the insurance company. The assets of the separate account were invested, as a policyholder directed, in shares of three mutual funds that were available only to segregated asset accounts established by the life insurance company. Shares of the

mutual funds were not available to investment plan accounts described in Rev. Rul. 70-525. Each mutual fund offered a different investment strategy. Even though a policyholder was permitted to allocate his or her purchase payments among the three mutual funds, the Service ruled that the insurance company, and not the policyholders, was the owner of the mutual fund shares held by the separate account because the ability of the policyholders to choose among broad investment strategies offered by each mutual fund was insufficient to conclude that the policyholders would be treated for federal income tax purposes as the owners of mutual fund shares that were not available to the general public.

In Christofferson v. U.S., 749 F.2d 513 (8th Cir. 1984), the taxpayers purchased a variable annuity contract from an insurance company, and the premium paid for the contract was invested in shares of a mutual fund held by a sub-account of the issuing insurance company's separate account. The Eighth Circuit held that the taxpayers were the beneficial owners of the investment funds held by the sub-account because the taxpayers selected the mutual fund to invest in and could change to another fund at any time, bore full investment risk, and could withdraw their investment upon seven days notice. Id. at 515. Furthermore, the court noted that the "payment of annuity premiums, management fees and the limitation of withdrawals to cash, rather than shares, do not reflect a lack of ownership or control." Id. at 515-16.

Congress enacted § 817 as part of the Deficit Reduction Act of 1984 (Pub. L. No. 98-369). Section 817(h)(1) provides that a variable contract (other than a pension plan contract) based on a segregated asset account is not treated as an annuity, endowment, or life insurance contract unless the investments made by the account are adequately diversified in accordance with regulations provided by the Secretary. According to the Conference Report, the conferees intended for the diversification standards to be "designed to deny annuity or life insurance treatment for investments that are publicly available to investors and investments which are made, in effect, at the direction of the investor." H.R. Conf. Rep. No. 98-861, at 1055 (1984).

Approximately two years after the enactment of § 817(h), the Treasury Department issued proposed and temporary regulations regarding the diversification requirements for variable annuity, endowment, and life insurance contracts. The preamble to the temporary regulations states as follows:

> The temporary regulations in this document do not address any issues other than the diversification standards applicable to variable annuity, endowment, and life insurance contracts. In particular, they do not provide guidance concerning the circumstances in which investor control of the investments of a segregated asset account may cause the investor, rather than the insurance company, to be treated as the owner of the assets in the account. For example, the temporary regulations provide that in appropriate cases a segregated asset account may include multiple sub-accounts, but do not specify the extent to which policyholders may direct their investments

> to particular sub-accounts without being treated as owners of the underlying assets. Guidance on this and other issues will be provided in regulations or revenue rulings under section 817(d), relating to the definition of variable contract.

T.D. 8101, 51 FR 32633 (September 15, 1986). The text of the temporary regulations served as the text of the proposed regulations, 51 FR 32664 (September 15, 1986), and the final regulations adopted the text of the temporary regulations with certain revisions not relevant to investor control. T.D. 8242, 54 FR 8728 (March 2, 1989).

The Service provided additional guidance under the investor control doctrine in Rev. Rul. 2003-91 and Rev. Rul. 2003-92. In Rev. Rul. 2003-91, the Service set forth a factual scenario under which a variable life insurance and a variable annuity contract holder would not have sufficient control over a separate account's assets to be treated as the owner of the assets. The variable contract was funded by a separate account that was divided into twelve sub-accounts. The issuing insurance company could increase or decrease the number of sub-accounts at any time, but there would never be more than 20 sub-accounts available under the contracts. Each sub-account offered a different investment strategy. Interests in the sub-accounts were available solely through the purchase of a variable life insurance or variable annuity contract that qualified as a variable contract under § 817(d). The investment activities of each sub-account were managed by an independent investment adviser. There was no arrangement, plan, contract, or agreement between the contract holder and the issuing insurance company or between the contract holder and the independent investment adviser regarding the availability of a particular sub-account, the investment strategy of any sub-account, or the assets to be held by a particular sub-account. Other than a contract holder's right to allocate premiums and transfer funds among the available sub-accounts, all investment decisions concerning the sub-accounts were made by the issuing insurance company or the independent investment adviser in their sole and absolute discretion. A contract holder had no legal, equitable, direct, or indirect interest in any of the assets held by a sub-account but had only a contractual claim against the issuing insurance company to collect cash in the form of death benefits or cash surrender values under the contract. The Service concluded that, based on all the facts and circumstances, the contract holder did not have direct or indirect control over the separate account or any sub-account asset, and therefore the contract holder did not possess sufficient incidents of ownership over the assets supporting the variable contracts to be the owner of the assets for federal income tax purposes.

In Rev. Rul. 2003-92, a life insurance company offered variable annuity and variable life insurance contracts to certain investors. In Situations 1 and 2, the contracts were funded by a segregated asset account that was divided into 10 sub-accounts, and each sub-account invested in interests in a nonregistered partnership that were available for purchase by the general public. Each sub-account was adequately

diversified under § 1.817-5(b)(1).[1] A contract holder could not independently own any interest in a partnership offered under the annuity or life insurance contract. Because the partnership interests were available for purchase other than by purchasers of variable annuity contracts, variable life insurance contracts, or other variable contracts from insurance companies, the Service concluded that the contract holder is the owner of the interests in the partnerships held by the sub-accounts for federal income tax purposes. However, in Situation 3, in which the partnership interests were only available through the purchase of a variable annuity contract, variable life insurance contract, or other variable contracts from insurance companies, the Service concluded the insurance company is the owner of the partnership interests.

In Webber v. Commissioner, 144 T.C. 324 (2015), the Tax Court ruled that petitioner, who established grantor trusts to purchase private placement variable life insurance policies on the lives of two elderly relatives, was the owner of the assets held by the separate accounts that funded the benefits under the policies. The court concluded that petitioner retained sufficient control over the investments by retaining the power to direct investments made by the separate account, the power to vote shares and exercise other options regarding the investments, the power to extract cash at will from the separate accounts, and the power to derive other benefits from the separate accounts (i.e., financing investments that were a source of personal pleasure, and using the separate account to complement the investments in his own portfolio). Id. at 361-369. Furthermore, the court concluded that the diversification requirements set forth in § 817(h) did not displace the investor control principles in Rev. Rul. 77-85. Id. at 373-377. The court did not address how the § 817(h) diversification requirements interact with the public availability prong of the investor control rulings. Id. at 374 n.19.

ANALYSIS

Under the investor control doctrine, a variable annuity contract holder can be treated as the owner of the assets held by a separate account that fund the contract, even when a separate account is adequately diversified or is not required to be diversified. Under § 817(h), investments upon which the Pension Contracts are based are not required to be adequately diversified. Whether the Pension Contract owners possess sufficient incidents of ownership over the Separate Account after the restructuring to be treated as the owner of the Separate Account's assets depends on all of the relevant facts and circumstances. The Pension Contract owners will be treated as the owner of the Separate Account's assets if either the investor control prong or the public availability prong of the investor control doctrine applies.

The public availability prong of the investor control doctrine generally provides that when the sole asset held by a separate account is available for purchase other than

[1] The prior version of § 1.817-5(f)(2)(ii) permitted the look-through rule in § 1.817-5(f)(1) to apply to a partnership interest that was not registered under a Federal or state law regulating the offering or sale of securities. T.D. 8242, 54 FR 8728 (March 2, 1989). The prior version of § 1.817-5(f)(2)(ii) was removed in T.D. 9185, 70 FR 9869 (March 1, 2005).

through the purchase of variable annuity or life insurance contracts, or other variable contracts from insurance companies, the contract holder will be treated as owner of the asset held by the separate account. See Rev. Rul. 81-225; Rev. Rul. 2003-92. In such circumstances, the contract holder's position is substantially identical to what his or her position would have been if he or she had directly or indirectly (as in Situation 4 of Rev. Rul. 81-225) purchased an interest in the asset held by the separate account.

After the restructuring, the assets of the Separate Account will primarily consist of ownership interests in Operating Partnership. However, the Separate Account will generally maintain more than v percent of its assets as Directly Held Assets, which are separate from its ownership interests in Operating Partnership. In addition, Taxpayer is not required to invest future money available to the Separate Account in Operating Partnership or any other particular asset, and has not promised the Pension Contract owners that it will do so. As such, a Pension Contract owner's position is not substantially identical to what its position would have been if it had purchased an interest in Direct Fund (the only asset of which is an interest in Operating Partnership).

Investment in the Separate Account is available solely through the purchase of a Pension Contract. The possibility that the Separate Account may make investments that are also available to the general public does not cause the Pension Contract owners to be treated as the owner of the Separate Account's assets for federal income tax purposes. The public availability prong of the investor control doctrine set forth in Rev. Rul. 81-225 and Rev. Rul. 2003-92 will not apply to treat the Pension Contract owners as the owner of the assets held by the Separate Account.

Furthermore, the investor control prong will not apply to the treat the Pension Contract owners as the owner of the Separate Account's assets. The Pension Contract owners may not select or direct a particular investment to be made with respect to the Separate Account. The Pension Contract owners may not sell, purchase, or exchange assets held in the Separate Account. All investment decisions concerning the assets of the Separate Account will be made by Affiliate, and certain decisions are subject to approval by Taxpayer's investment committee.

The investment strategy of the Separate Account of investing in real estate assets is sufficiently broad to prevent the Pension Contract owners from making particular investment decisions through investment in the Separate Account. Only Taxpayer or Affiliate may add or substitute investment strategies in the future. Neither Taxpayer nor Affiliate is permitted to solicit the Pension Contract owners to make recommendations about the selection, quality, or rate of return of any specific investment or group of investments held in the Separate Account. The Pension Contract owners will not have any more control over the assets of the Separate Account than the contract owners in Rev. Rul. 82-54 or Rev. Rul. 2003-91.

CONCLUSION

Following the proposed restructuring described above, Taxpayer will be the owner of the assets held by the Separate Account for federal income tax purposes.

The use of the term “restructuring” in this ruling is for descriptive convenience only and is not intended to have any substantive legal effect.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. In particular, no opinion is expressed or implied regarding whether Operating Partnership is treated as a partnership for federal tax purposes. The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representatives.

Sincerely,

Alexis A. MacIvor
Branch Chief, Branch 4
Office of Associate Chief Counsel
(Financial Institutions & Products)

cc: